IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 49.

LOCAL 24 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and KENNETH BURKE, President and Business Agent of Local 24,
Petitioners,
vs.
REVEL OLIVER and A. C. E. TRANSPORTATION COMPANY, INC., and INTERSTATE TRUCK SERVICE, INC.,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of Ohio and the Court of Appeals of the State of Ohio, Ninth Judicial District.

REPLY BRIEF FOR PETITIONERS.

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

Of Counsel:
ROBERT C. KNEE,
Winters Bank Building,
Dayton, Ohio,
BRUCE LAYBOURNE,
Second National Building,
Akron, Ohio.

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous Cited.

Textbook Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 49.

LOCAL 24 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and KENNETH BURKE, President and Business Agent of Local 24,
Petitioners,

vs.

REVEL OLIVER and A. C. E. TRANSPORTATION COMPANY, INC., and INTERSTATE TRUCK SERVICE, INC.,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of Ohio and the Court of Appeals of the State of Ohio, Ninth Judicial District.

REPLY BRIEF FOR PETITIONERS.

ARGUMENT.

I. SINCE ONLY FEDERAL QUESTIONS ARE REVIEWABLE IN THIS COURT, IT IS IMMATERIAL WHETHER THE OHIO COURTS CORRECTLY CONSTRUED THE OHIO ANTI-TRUST LAWS.

The brief of Respondents A. C. E. and Interstate (pp. 31-46) presents an extended argument in support of the finding below that Article 32 of the Central States Agreement violates the Ohio anti-trust laws. The same argu-

ment is urged by Respondent Revel Oliver (Oliver Br., pp. 34-43); however, Oliver goes on to assert that the *only* question before this Court is whether Article 32 of the Central States Agreement violates the Ohio anti-trust laws (Br., p. 29). Such arguments have no bearing on the issues here. *See e. g.: Commercial Bank v. Buckingham's Executors*, 5 How. 317, 342-343. The issue here is not whether Ohio has properly construed state law but whether in doing so it has invaded a federally pre-empted area.

Respondents also argue that this Court is bound by the Findings of Fact below (A. C. E. Br., pp. 11-12). There is no need in this case to determine the scope of review in cases arising under the Supremacy clause, for the Respondents' contention merely begs the question in this case. We are concerned here with the precise problem of whether the state courts have authority to make ultimate findings which are determinative of rights and duties under the federal law.

II. CONTRARY TO RESPONDENTS' ARGUMENT, FEDERAL PRE-EMPTION IN THE FIELD OF LABOR RELATIONS IS NOT DEPENDENT UPON THE EXISTENCE OF CONFLICTING REMEDIES. MOREOVER, CONFLICTS ARE IN FACT CREATED AS A CONSEQUENCE OF THE JUDGMENT BELOW.

The contention of Respondents A. C. E. and Interstate (Br., pp. 13-31) that pre-emption applies only where the National Act affords a remedy *against* the Union disregards the decisions of this Court which have consistently barred state remedies against or regulation of *protected* conduct and contracts. *See e. g.: California v. Taylor*, 353 U. S. 553, 560; *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, 394; *United Auto Workers v. O'Brien*, 339 U. S. 454, 458-459; *Hill v. Florida*, 325 U. S. 538, 541-542.

Stated another way, the "actual or potential" conflict which "leads to easy exclusion of state action" (*Weber v. Anheuser-Busch*, 348 U. S. 468, 480) includes, but is not limited to, cases involving parallel remedies. Conflict can and does exist where federal law provides no remedy but state law does. As this Court pointed out in *Garner v. Teamsters Union*, 346 U. S. 485, 500:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

Additionally, however, employers such as A. C. E. and Interstate are in no position to contend, in this proceeding, that Article 32 embodies non-bargainable subjects. Such arguments could have been presented to the Labor Board in 1952 when the Union struck Ohio carriers for the purpose of obtaining the Article (R. 214-215). It could also have been raised in 1955 at the time of the negotiation of the current contract. *NLRB v. Borg-Warner Corp.*, 356 U. S. 342. The same "remedy" was available to Revel Oliver; for, regardless of his alleged independent contractor status, he is a "person" entitled to file a charge under Section 10 (b) of the National Act and Section 102.9 of the Labor Board's rules.[1] *Cf. Local Union No. 25 v. New York, New Haven Ry.*, 350 U. S. 155, 160.

At the time of the 1952 strike Revel Oliver also could have filed charges under Section 8 (b) (4) (A), which prohibits, among other things, strikes to compel independent contractors to join a labor organization (*Lakeview Creamery Co.*, 107 NLRB 601); or he could have filed a repre-

---

[1] Section 102.9, in material part, provides: "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. . . ."

sentation petition thereby obtaining an adjudication of his status under the National Act.

Respondents have cited a number of United States Supreme Court cases which Petitioners did not refer to in their brief. Examination of such additional cases demonstrates their complete lack of pertinency. *Teamsters Union v. Hanke*, 339 U. S. 470, involved the effort of a union to negotiate a contract regulating the business hours of a sole proprietor of a small business. The question of federal pre-emption was not involved, and the cases did not involve a collective bargaining agreement with an employer of many employees which in part assures that drivers of their own equipment shall have the status of employees and be guaranteed all the benefits negotiated for such employees. *Compare: Weber v. Anheuser-Busch*, 348 U. S. 468, *with Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490.

International Association of Machinists v. Gonzales, 356 U. S. 617, involved only the determination that protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power was expressly denied.

As Petitioners pointed out in their principal brief (p. 11), *United Auto Workers v. Russell*, 356 U. S. 634, involved violence and mass picketing—the only area consistently excepted from the rule of pre-emption in the field of labor relations. Because the case involved violence and mass picketing it is not relevant to the issues presented in this case.

With one exception, the anti-trust cases cited at pages 32 through 43 of Respondent A. C. E.'s brief did not involve the question of pre-emption under the National Act in any aspect. The exception is *Commonwealth v. McHugh*, 326 Mass. 249, 93 N. E. 2d 751. Although the opin-

ion is ambiguous so far as pre-emption under the National Act is concerned, Petitioners accept the Respondents' conclusion that pre-emption was held inapplicable because "there was no controversy concerning terms or conditions of employment" (A. C. E. Br., p. 42). More specifically, the Massachusetts court held that no "labor dispute" as defined in the National Act existed.

Precisely the same reasoning was used by the Missouri courts in *Weber v. Anheuser-Busch*, 348 U. S. 468, to sustain the application of state anti-trust laws to a labor union notwithstanding the Union's claim of federal pre-emption. The fallacy inherent in such reasoning was cogently demonstrated in the *amicus curiae* brief of the Labor Board (pp. 31-32) filed in the *Weber* case:

> "But whether or not the conduct in question be deemed a labor dispute is, after all, of no consequence. For there is no requirement in the federal Act making the existence of a labor dispute a prerequisite to the Act's application.
>
> * * * * * * * *
>
> "Likewise, the existence or non-existence of an unfair labor practice is not the criterion by which the state's power can be determined. As has already been demonstrated, what is critical is not whether particular conduct constitutes an unfair labor practice, but whether Congress has occupied the area in which that conduct falls. The Board, exercising its exclusive jurisdiction, may find an unfair labor practice or may find that the disputed conduct falls within the area Congress chose not to restrict. The decisive point in either event is that the Board, and not state courts, is the agency authorized to make the determination."

Here, as in *California v. Taylor*, 353 U. S. 553, the state courts have denied federally protected labor rights. In addition, however, numerous conflicts are created by the

judgment below. Conflicts with respect to the duty of A. C. E. and Interstate to bargain with the Union are the inevitable consequence of the judgment below (Pet. Br., pp. 33-36). Additional conflicts with respect to employee status of owner-drivers (Pet. Br., pp. 36-41) and conflicts between state and federal authority in the area of multi-employer bargaining units (Pet. Br., pp. 41-43) are equally imminent.

Either the denial of federally protected labor rights or the conflicts created by the judgment below provides an independent, compelling reason for reversing the judgment of the Ohio courts.

III. VALIDITY OF ARTICLE 32, UNDER THE NATIONAL ACT, IS NOT CONTROLLED BY RESPONDENT REVEL OLIVER'S STATUS AS AN EMPLOYEE OR INDEPENDENT CONTRACTOR.

Respondents persistently urge that the validity of the judgment below hinges upon the determination of whether Revel Oliver is an independent contractor in his capacity of "lessor of equipment" (E. G., A. C. E. Br., p. 5). That point is not in any way involved. Rather, the question is whether, under the National Act, Revel Oliver, when he drives his own piece of equipment in the service of a certificated carrier, may be vested with the status of employee as a result of collective bargaining; and whether, under the National Act, the minimum lease rate on the owner-driven equipment which assures the payment of negotiated wage rates to such an employee, is a matter for collective bargaining. The court below found that neither contract provision fell within the area pre-empted by the National Act.

But for the judgment below and the restraining orders issued prior to the commencement of the instant proceed-

ing (R. 229), Article 32 would have been enforced by the Union (R. 103) and implemented by the carriers (R. 19). Had the Article been enforced, Revel Oliver's status as an employee, while actually driving in service of a carrier, would not be arguable. *G. L. Allen Co.*, 117 N. L. R. B. 1055, 1056n. This was acknowledged by the courts below (R. 173). Thus, as indicated above, the critical inquiry to be made is whether the Labor Board reasonably could find that the subjects embodied in Article 32 fall within the matrix of compulsory or permissive bargaining.

The question of Revel Oliver's status, under the National Act, is relevant here only because the *modus operandi* used by the courts below in resolving the question varies so dramatically from that of the Labor Board (Pet. Br., pp. 36-41); thereby further demonstrating the conflicts created by the state court judgments. Significantly, the Ohio Courts, while declaring Revel Oliver to be an independent contractor, as a lessor of equipment, carefully and deliberately avoided considering his status as a driver of equipment (Pet. Br., pp. 36-37).

The assertion of A. C. E. and Interstate (Br., pp. 5, 7, 11) that the Labor Board's decision in *A. C. E. Transportation Co.*, 120 N. L. R. B. No. 150, *appeal pending*, C. A. D. C. No. 14558, authoritatively adjudicates Respondent Revel Oliver's status under the National Act is devoid of merit. The argument disregards the fact that neither Revel Oliver nor Interstate was a party to the Labor Board proceeding. Secondly, the question in the Labor Board proceeding was whether picketing at the premises of A. C. E. violated Section 8 (b) (4) (A) of the National Act. The Labor Board held that because the drivers of certain equipment leased to A. C. E. were employees of the lessors and not employees of A. C. E., the picketing was unlawful. The status, as drivers, of the lessors or fleet owners who drove their own equipment was not germane to the Labor Board proceeding and was not decided by the Labor Board.

Finally, the theory urged by A. C. E. and Interstate in support of state jurisdiction to determine questions of "employee" vs. "independent contractor" status for purposes of federal labor law contains the seeds of self-destruction. For the Respondents assert:

> "In this particular case, the common law definition of 'independent contractor' is applied in cases before the N. L. R. B., but in many cases arising under state law, this rule varies by reason of peculiar local laws. If we make due allowance for the variations in local laws, we can draw a simple test . . ." (A. E. C. & Interstate Br., p. 48).

If "due allowance" for "peculiar local laws" is made, it is obvious that Revel Oliver's status under the National Act will vary from day to day depending upon the local laws of the particular state in which he finds himself. *NLRB v. Hearst Publications*, 322 U. S. 111, 123; *Cf.* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 5-8 (1947). Certainly, if the question of Revel Oliver's status had been presented to a federal district court in Ohio, that court would have referred the parties to the Labor Board. *Television & Radio Artists v. Getreu*, 42 L. R. R. M. 2693, 2695 (C. A. 6).

IV. ARTICLE 32, IN ALL RESPECTS, FALLS WITHIN THE AREA OF WAGES, HOURS AND WORKING CONDITIONS PROTECTED UNDER THE NATIONAL ACT.

As Petitioner's principal brief (pp. 22-33) demonstrated, except for Section 4 of Article 32, the Article applies only to individuals who actually drive their own equipment in the service of a carrier covered by the agreement. Section 4, by requiring all drivers of leased equipment to be employees of the carrier, precludes the carrier from entering into lease arrangements with fleet owners pursuant to

which employees of the fleet owner operate the leased equipment. To this extent only does the Article have any effect upon Revel Oliver as an "employer," "independent contractor," "fleet-owner."

The function of Section 4, in this regard, is precisely the same as any other subcontracting clause (Pet. Br., pp. 26-28). Perhaps the most significant single indicia of the accepted role which subcontracting clauses play in labor relations is found in the fact that at least 75 reported arbitration cases have involved such problems.[2] Typical of the more recent arbitration decisions is *A. D. Julliard Co., Inc.*, 21 L. A. 713, 724,[3] where the arbitrator held:

> "To allow the Company, after signing an agreement covering standards of wages and conditions for mending room jobs and employees, to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the Contract and destroy the meaning of the collective bargaining relation. No standards would be safe. The work would go to employees for whom the Union has no bargaining rights even though the Recognition clause establishes the Union as the sole and exclusive bargaining agent during the term of the agreement for the jobs in question. And the work could be performed under conditions and rates of pay that would undermine the collective bargained standards."

Other arbitrators adopt the view expressed in *Parke Davis & Co.*, 15 L. A. 111, 114, which limits the employer's right to subcontract only if the collective agreement "in rather specific terms" regulates such practices. Both views recognize the importance and appropriateness of clauses such

---

[2] Bureau of National Affairs, Labor Arbitration Cumulative Digest and Index, Reference No. 117.38.

[3] "LA" refers to "Labor Arbitration," a multi-volume set of arbitration decisions published by the Bureau of National Affairs.

as Article 32, Section 4 of the Central States Agreement, which prohibit subcontracting practices. It should be here emphasized that, while Section 4 is found in Article 32 relating to all owner-operator practices, it is an independent provision of general application and should be considered as such.

The remaining sections of Article 32 establish the wages, hours and working conditions for owner-drivers (Pet. Br., pp. 22-34). They apply only "where owner is also employed as a driver" (Ex. 1, p. 38, R. 144). Whether the various provisions of the Article are considered separately or collectively, Petitioners submit that the entire Article is affirmatively protected under the National Act.

For the foregoing reasons, Petitioners respectfully submit that the judgment below should be reversed.

Respectfully submitted,

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

Of Counsel:

ROBERT C. KNEE,
Winters Bank Building,
Dayton, Ohio,

BRUCE LAYBOURNE,
Second National Building,
Akron, Ohio.